IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-880

DT. SGT. THOMAS D. LOWTHER; DT. SGT. THOMAS D. LOWTHER, PRESIDENT, POLICE ASSOCIATION OF MONTGOMERY COUNTY, MARYLAND, INC., A MARYLAND CORPORATION

and

MONTGOMERY COUNTY, MARYLAND, A MUNICIPAL CORPORATION

Petitioners,

v.

STATE OF MARYLAND EMPLOYEES RETIREMENT SYSTEM, DIVISION OF SOCIAL SECURITY, MILDRED POTASH, ADMINISTRATOR

and

F. DAVID MATTHEWS, SECRETARY OF THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

and

ROBERT M. BALL, COMMISSIONER OF SOCIAL SECURITY AND THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE FOURTH CIRCUIT COURT OF APPEALS

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IN THE
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October Term, 1977

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No.

DT. SGT. THOMAS D. LOWTHER; DT. SGT. THOMAS D. LOWTHER, PRESIDENT, POLICE ASSOCIATION OF MONTGOMERY COUNTY, MARYLAND, INC., A MARYLAND CORPORATION

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
FOURTH CIRCUIT COURT OF APPEALS

The Petitioners, DT. SGT. THOMAS D. LOWTHER, individually and as PRESIDENT of the POLICE ASSOCIATION OF MONTGOMERY COUNTY,

MARYLAND, INC., A MARYLAND CORPORATION and MONTGOMERY COUNTY, MARYLAND, A MUNICIPAL CORPORATION, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the Fourth Circuit Court of Appeals entered in this proceeding September 20, 1977.

OPINION BELOW

The opinion of the Fourth Circuit Court of Appeals is reported in 561 Federal Reporter, 2d, pages 1120-1123, a copy of that opinion is printed in the Appendix.

JURISDICTION

The judgment and opinion of the Fourth Circuit Court of Appeals was

entered September 20, 1977. The Fourth Circuit Court of Appeals entered an order vacating the judgment of the District Court on the merits and remanding the case to that Court with instructions to dismiss the complaint for lack of jurisdiction. This Petition was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Were the jurisdictional requirements of Title 42 U.S.C. 405(g) as interpreted by this court in Weinberger v. Salfi in 422 U.S. 749 (1975) satisfied when the Social Security Retirement System Coverage Group of Montgomery County Policemen

requested termination of coverage for all its members including the Petitioner Lowther pursuant to the provisions of Title 42 U.S.C., Section 418(g)(1)(B)?

2. Were the jurisdictional requirements of Title 42 U.S.C., Section 418(g)(1)(B) met when no appeal was taken by the Respondents to factual findings of the District Judge that a proper request by the State of Maryland had been made for termination of coverage for the Social Security Retirement System Coverage Group known as the Montgomery County Policemen?

3. Were the formality requirements, if any, of Title 42 U.S.C., Section 418(g)(1)(B) satisfied by making the State of Maryland a party to this litigation when evidence demonstrated

and the District Judge found no formality requirements existed and as Petitioners argue that the State of Maryland in its role prescribed by Title 42 U.S.C., Section 418(g)(1)(B) acted with an arguable conflict of interest to avoid a class action suit by the Petitioners?

4. Was the "final decision" requirement of 405(g) as interpreted by this Court in Weinberger V. Salfi, 422 U.S. 749 (1975) satisfied in this case when the findings of fact by the District Judge adopted by the Circuit Panel clearly indicate the nonexistence of any administrative procedure for termination request under 418(g)(1)(B) and the record clearly establishes both Petitioners and Respondents as adversaries while represented by counsel,

argued their respective positions before opinions were rendered, at first by the Regional Commissioner of Social Security and later by the Commissioner himself in the form of a written opinion?

STATUTORY PROVISIONS INVOLVED

1. Title 42 U.S.C., Section 405 (g); a copy of this provision is printed in the Appendix.

2. Title 42 U.S.C., Section 418 (g)(1)(B):

> (g) Termination of agreement. (1) Upon giving at least two years' advance notice in writing to the Secretary of Health, Education and Welfare, a State may terminate, effective at the end of a calendar quarter specified in the notice, its agreement

> with the Secretary either--
>
> (A)--
>
> (B) With respect to any coverage group designated by the State, but only if the agreement has been in effect with respect to such coverage group for not less than five years prior to Receipt of such notice.

3. Title 42 U.S.C., Section 418 (d)(3) in its entirety; a copy of this provision is printed in the Appendix.

STATEMENT OF THE CASE

These two cases raise questions concerning statutory provisions which extend coverage of the Social Security Act to state and local employees. By

order of the District Court, both cases were consolidated for all purposes pursuant to Rule 42(a) of the Federal Rules of Civil Procedure and by consent of all parties a judicial determination of all issues would be applicable to all present and former policemen.

In Civil No. 73-661-H, Montgomery County, Maryland sued on behalf of its police officers, the coverage group seeking termination of coverage under Title 42 U.S.C., Section 418(g)(1)(B), while in Civil No. H-74-530, Dt. Sgt. Thomas Lowther, individually as a member of the coverage group and in his role as President of the Police Association of Montgomery County sued on behalf of the police officers for the coverage group seeking termination. In the Consolidated Amended Bill of Complaint, Petitioners assert jurisdictional basis in the District Court pursuant to 28

U.S.C., Section 1331(a); 28 U.S.C., Section 2281, 2282-2284; 42 U.S.C. 405(g); Title 5 U.S.C, Section 703; Title 28 U.S.C., Section 1361. The District Court found jurisdiction in 28 U.S.C., Section 1331(a), 42 U.S.C. 405(g), 5 U.S.C., 701 et seq.

The consolidated Amended Complaint sought a declaration that the policemen for Montgomery County entered the Social Security Program as a separate absolute coverage group and as such are capable of terminating their coverage under the provisions of 418(g)(1)(B); that the policemen for Montgomery County terminated coverage under Title 42 U.S.C., Section 418(g)(1)(B) on or before July 22, 1971, effective date of termination under the Act being June 30, 1973; that the Court declare the referendum held on April 5, 1965 invalid as not complying with Title 42 U.S.C.,

Section 418(d)(3)(E); that the Court enjoin Montgomery County from withholding funds from bi-weekly pay checks for Social Security contributions; that the Court award costs and counsel fees to the Petitioners. Named as defendants in this action were the Commissioner of Social Security, Secretary of the Department of Health, Education and Welfare; and the Employees Retirement System of the State of Maryland.

Title 42 U.S.C., Section 418(a) authorizes the Secretary to enter into an agreement with any state for the purposes of extending social security coverage to state and local governmental employees. After such an agreement has been in effect for five years, the state pursuant to Section 418(g)(1)(B) may terminate that agreement "with respect to any coverage group designated by the state" by giving written notice

two years in advance of termination.

In 1951, the State of Maryland and the Secretary's predecessor, the Federal Security Administrator, executed an agreement under Section 418(a) "for the purpose of extending the old age and survivors' insurance system established by Title II of the Social Security Act.. to services performed by individuals employed by political subdivisions of the State of Maryland." By 1958, this coverage included all employees of Montgomery County except police officers and elected officials. Subsequent enabling legislation provided for coverage group status of policemen. The policemen of Montgomery County had a separate retirement system. The passage of Section 418(d)(3) permitted the extension of coverage to governmental employees covered by a retirement system

provided that a referendum is held and a majority of the eligible employees vote in favor of such coverage.

On April 5, 1965, Montgomery County Police Officers held such vote in favor of being included within the outstanding agreement with the State of Maryland. The Chief of the Division of Social Security, Board of Trustees of the Employees retirement System of the State of Maryland, who is the state official empowered to seek modification of the agreement with the Secretary was notified by Montgomery County of the favorable vote but never certified these results to the Secretary of Health, Education and Welfare as required by Title 42 U.S.C., Section 418(d)(3). No agreement or modification of the original federal-state agreement extending the insurance system established by the

Title to the Police Retirement System was executed within two years of the vote as required by Title 42 U.S.C., Section 418(d)(3)(E).

On April 2, 1971, approximately six years after the coverage in question had become effective, Montgomery County Policemen conducted another vote and on this occasion voted to withdraw from social security coverage. The Montgomery County Council formally notified the State Administrative Officer of the County's desire to terminate social security coverage for its policemen pursuant to Section 418(g)(1). This request was referred to the Regional Commissioner for Social Security Administration. This request was denied. A further request in the form of an "appeal" was made to the Commissioner. On February 2, 1973, the Commissioner of

Social Security took action which in effect denied the State's appeal and affirmed the previous determination that the relevant coverage group for the purposes of terminating coverage was composed of all employees of Montgomery County and not merely policemen. This action was thereafter filed. Finding the Petitioners had standing and the Court had jurisdiction to hear the case under Title 42 U.S.C., Section 405(g); Title 28 U.S.C., Section 1331(a); and Title 5 U.S.C., Section 701, et seq., the District Court nonetheless ruled in favor of the Respondents on the following issues:

(a) Whether the original referendum was valid.

(b) Whether the Respondent was estopped to deny coverage under the principle of Federal Crop Insurance

Corporation v. Merrill, 332 U.S., 380 (1947).

(c) Whether an interpretation of the provisions of Title 42 U.S.C., Section 418 et seq. entitles the retirement system coverage group, Montgomery County Police, to terminate coverage pursuant to Title 42 U.S.C., Section 418(g)(1)(B).

(d) Whether Title 42 U.S.C., Section 418(g)(1)(B) in form or application to the facts of this case is unconstitutional.

An appeal was taken to the Fourth Circuit Court of Appeals by the Petitioners on those merit issues decided by the Court and the same were argued before the panel on October 7, 1976. No appeal was taken by either Respondents.

By written published opinion, the

Court of Appeals for the Fourth Circuit vacated the judgments of the District Court on the merits, and ordered a remand of the case to the District Court with instructions to dismiss the complaint for lack of subject matter jurisdiction.

REASONS FOR GRANTING THE WRIT

I.

THE LOWER COURT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The Petitioners suggest that Title 42 U.S.C., Section 418(g)(1)(B) allows the retirement system coverage group to file a request for termination of coverage on behalf of all its members, one of which was the Petitioner. When this is done, the "individual" claim requirement of Title 42 U.S.C., Section 405(g)

has been met.

Since jurisdiction in the Federal District Court for claims under the Social Security Act lies squarely in Title 42 U.S.C., Section 405(g), this Court should decide whether the statutory requests for termination of coverage benefits for coverage groups on behalf of their individual members meet the "individual claim" requirement of Section 405(g).

II.

THE LOWER COURT HAS RENDERED A DECISION ON A FEDERAL QUESTION IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The record, supported by the findings of the District Judge, to which no appeal was taken establishes no administrative review provisions existed for coverage group recipients of adverse

decisions to Title 42 U.S.C., Section 418(g)(1)(B) termination request. The record further reflects Petitioners and Respondents were represented as adversaries by their own counsel during that prelitigation phase when the documented requests for termination with written reasons in support thereof were denied. The Petitioners assert that the written opinion of the Commissioner denying relief constitutes a "final decision" under the principles of this Court in Weinberger v. Salfi, 422 U.S. 749 (1975) and Matthews v. Eldridge 424 U.S. 319 (1976).

THE LOWER COURT'S RULING ON THE FORMALITY REQUIREMENTS OF THE STATE OF MARYLAND'S REQUEST FOR TERMINATION PURSUANT TO TITLE 42 U.S.C., SECTION 418(g)(1)(B) IS A DECISION NOT PREVIOUSLY RULED UPON BY THIS COURT AS A JURISDICTIONAL PREDICATE FOR FILING SUIT IN THE FEDERAL DISTRICT COURTS. INSOFAR AS THE COURTS RULING IS INCONSISTENT WITH THE

FINDINGS OF FACT OF THE DISTRICT JUDGE TO WHICH NO APPEAL WAS TAKEN BY RESPONDENTS, IT IS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The Petitioners suggest this Court should rule on the formality requirements of the State's request for termination pursuant to Title 42 U.S.C., Section 418(g)(1)(B). The record is clear and the District Judge found as fact no formal requirements had been established by the Secretary.

Confronted with the merit arguments stated under Title 42 U.S.C., Section 418(d)(3) in its entirety, the State of Maryland did everything possible to facilitate the policemen's request for termination. For purposes of litigation, the District Court ruled in response to the Federal Respondent's Motion to Dismiss, that the formal party requirement was satisfied by making the State

of Maryland a party defendant.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 76-1229

Dt. Sgt. Thomas D. Lowther;
Dt. Sgt. Thomas D. Lowther,
President, Police Association
of Montgomery County, Maryland,
Inc., a Maryland Corporation,

Appellant,

versus

Montgomery County, Maryland, a
municipal corporation, State of
Maryland, Employees Retirement
System Division of Social Security,
Mildred Potash, Administrator,
James Caldwell, Commissioner of
Social Security and F. David Mathews,
Secretary of the Department of
Health, Education and Welfare,

Appellees.

No. 76-1230

Montgomery County, Maryland, a
Municipal Corporation,

Appellant,

versus

Robert M. Ball, Commissioner of Social Security and the Department of Health, Education and Welfare, and State of Maryland

Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge.

Argues October 7, 1976
Decided Sept. 20,1977

Before HAYNSWORTH, Chief Judge, BUTZNER and WIDENER, Circuit Judges

---

Peter I. J. Davis for Appellant Dt. Sgt. Thomas D. Lowther (Richard S. McKernon, County Attorney for Montgomery County, Alfred H. Carter, Deputy County Attorney for Montgomery County, Martin J. Hutt, Assistant County Attorney for Montgomery County on brief) for Appellant Montgomery County, Maryland. James F. Truitt, Jr., Assistant Attorney General (Francis B. Burch, Attorney General on brief) for Appellee; Henry Eigles, Attorney, Office of General Counsel, Department of Health, Education and Welfare (Jervis Finney, United States Attorney and Donald H. Feige, Assistant United States Attorney on brief) for Appellee.

HAYNSWORTH, Chief Judge:

The policemen of Montgomery County, Maryland sought to terminate their social security coverage, and brought this action to obtain (1) a determination that they constitute a separate "coverage group" for the purpose of such termination and (2) an injunction to require the Social Security Administration to terminate their coverage retroactively. Since no plaintiff is an individual who has presented a claim challenging his coverage to the Secretary or his delegate, we conclude there is no jurisdiction under 42 U.S.C.A. 405(g). Since the State of Maryland has not officially challenged the Secretary's conclusion that the policemen are not a separate coverage group, there is no jurisdiction under

42 U.S.C.A. 418. Hence, we conclude that there is no subject matter jurisdiction of this controversy.

In 1971, the policemen of Montgomery County voted to terminate their social security coverage. The Montgomery County Council adopted a resolution notifying the Chief of the Social Security Division of Maryland's Employment Retirement System that the policemen wished to discontinue their social security coverage on June 30, 1973. The resolution, however, disclaimed any approval or disapproval by the County Council of the policemen's request.

The State administrative office sought the advice of the Regional Commissioner of Social Security who expressed the opinion that while all of the employees of Montgomery County could

withdraw from the program, the policemen, alone, could not. After further informal meetings, the County Personnel Director sent a letter denominated an "appeal" to the state Social Security Administrator, who forwarded it to the Social Security Administration. The Commissioner of Social Security sent the state Social Security Administrator a report containing a ruling, in agreement with the earlier opinion of the Regional Commissioner, that the Montgomery County policemen alone could not withdraw from the program.

Thereafter, plaintiff Lowther, Individually and as President of the Montgomery County Police Association, and Montgomery County filed this action.

Though subsequently holding against the plaintiffs on the merits, the

district court found jurisdiction under 28 U.S.C.A. 1331. Resting jurisdiction upon§1331, it concluded, was not precluded by 42 U.S.C.A. 405 (h), since it found no provision in the Social Security Act for a hearing and administrative review of a group's claim of a right of termination.

After the district court's ruling on jurisdiction, the Supreme Court's opinions in Weinberger v. Salfi, 422 U.S. 749 (1975) and Mathews v. Eldridge, 424 U.S. 319 (1976) were announced. Salfi was a class action attacking certain duration-of-relationship social security eligibility requirements as unconstitutional. The district court in Salfi had looked upon § 405(h) as only a codification of the exhaustion requirement presenting no barrier to the exercise of federal

question jurisdiction under 28 U.S.C.A. 1331. The Supreme Court disagreed, holding that 42 U.S.C.A. 405(h) was an absolute bar to the exercise of jurisdiction under § 1331 of any claim arising under Title II of the Social Security Act.

Because of the intervening decisions in the Supreme Court, at oral argument the plaintiffs conceded that jurisdiction could not be founded upon § 1331. Instead, they assert jurisdiction under 42 U.S.C.A. 405(g) which provides that "any individual, after any final decision of the Secretary made after a hearing to which he was a party, *** "may obtain review of the Secretary's decision by a civil action timely filed. They look to language in Mathews v. Eldridge, supra, in which it was said that the requirement of a final

decision by the Secretary in 405(g) consisted of two elements. One of the elements is that administrative remedies be exhausted, a requirement that could be waived by the Secretary. The other element, however, is strictly jurisdictional. It is that a claim shall have been presented to the Secretary, for in the absence of a claim properly presented, there could be no "decision." Thus there can be no judicial review under § 405(g) by a plaintiff who has filed no claim.

The plaintiffs would avoid the jurisdictional claim requirement of § 405(g), since in this case the Commissioner has actually ruled upon the plaintiffs' contention that they constitute a separate coverage group. It is true that there has been, at least, an informal ruling by the Commissioner, but

that does not avoid the jurisdictional problem because § 405(g) authorizes judicial review only when sought by an "individual" after a final decision by the Secretary made after a hearing to which the individual was a party. Montgomery County, one of the plaintiffs, is not such an individual, and Lowther, the only individual plaintiff, filed no claim and has not been a party to any hearing. Nor is his position enhanced by representation of the Police Association, for the Association is not an individual entitled to review.

Lowther may present his contention by seeking a review of his social security wage records under § 405(c), and any adverse determination by the Secretary would be open to judicial review under § 405(g). There is no indication that he has done that or, by any

other means, presented his claim or contention to the Secretary or his delegate. Officials of the county and state have presented the policemen's desire to withdraw from the social security system to officials of the Social Security Administration, but Salfi, supra, and Eldridge, supra, make it quite clear that only individuals who themselves have presented their claims to the Secretary are entitled to judicial review under § 405(g). Salfi was a purported class action. The named plaintiffs had presented their claims to the Secretary and the Secretary had denied them, but the Supreme Court held there was no jurisdiction to consider the class claims, for there was no allegation that the unnamed members of the class had ever filed applications with the Secretary for the benefits they sought.

There may be a degree of futility in a requirement that judicial consideration be postponed to a final decision by the Secretary after a hearing upon a claim asserted by an individual policeman. If further administrative proceedings were futile beyond all question, exercise of judicial jurisdiction would still be foreclosed. There was such a suggestion in Salfi, but the Supreme Court said that the "final decision" requirement of 405(g) is:

> something more than simply a codification of the judicially developed doctrine of exhaustion, and may not be dispensed with merely by a judicial conclusion of futility.

In this instance, however, futility may not be obvious. The question has not been presented to the Secretary in an adversary proceeding. In an informal way, representatives of the Social

Security Administration have been informed of the wishes of the policemen, but there has been no hearing; no evidence has been presented and no advocate for the policemen has argued their case before a hearing officer. Nor has there been any presentation of their position by an advocate in their behalf to any reviewing authority. Perhaps, when administrative remedies are pursued, the Secretary will come to the same conclusion, but that will remain uncertain until the necessary administrative proceedings are completed.

Under 42 U.S.C.A. 418(t) Maryland itself may prosecute the claim of the policemen through the claim and review procedures of the Social Security Administration and may seek judicial review of an adverse decision under 418(s). Maryland, however, has prosecuted no such administrative proceedings and is not a

party to this judicial proceeding. Hence, we have no jurisdiction under 418(s).

Finally, jurisdiction cannot be rested upon 10 of the Administrative Procedure Act, 5 U.S.C.A. 701, et seq. because the Supreme Court has recently held that the Administrative Procedure Act is not an independent grant of subject matter jurisdiction. Califano v. Sanders, 45 U.S.L.W. 4209 (1977).

Since there is no subject matter jurisdiction, we will vacate the judgment of the district court on the merits, and remand the case to that court with instructions to dismiss the complaint.

VACATED AND REMANDED

42 USC § 405

(a)****
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(g) Judicial review. Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his

answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall

review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Secretary made before its files its answer, remand the case to the Secretary for further action by the Secretary, and may, at any time, on good cause shown, order additional evidence to be taken before the Secretary, and the Secretary shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm his findings of fact or his decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which his action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only

to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions. Any action instituted in accordance with this subsection shall survive notwithstanding any change in the person occupying the office of Secretary or any vacancy in such office.

42 USC § 418

(a) ****
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(d) (1) *****

(2) *****

(3) Notwithstanding paragraph (1), an agreement with a State may be made applicable (either in the original agreement or by any modification thereof) to service performed by employees in positions covered by a retirement system (including positions specified in paragraph (4) but not including positions excluded by or pursuant to paragraph (5)), if the governor of the State, or an official of the State designated by him for the purpose, certifies to the Secretary of Health, Education, and Welfare that the following conditions have been met:

(A) A referendum by secret written ballot was held on the question of whether service in positions covered by such retirement system should be excluded from or included under an agreement under this section;

(B) An opportunity to vote in such referendum was given (and was limited) to eligible employees;

(C) Not less than ninety days' notice of such referendum was given to all such employees;

(D) Such referendum was conducted under the supervision of the governor or an agency or individual designated by him; and

(E) A majority of the eligible employees voted in favor of including service in such positions under an agreement under this section.

An employee shall be deemed an "eligible employee" for purposes of any referendum with respect to any retirement system if, at the time such referendum was held, he was in a position covered by such retirement system and was a member of such system, and if he was in such a position at the time notice of such referendum was given as required by clause (C) of the preceding sentence, except that he shall not be deemed an "eligible employee" if, at the time the referendum was held, he was in a position to which the State agreement already applied, or if he was in a position excluded by or pursuant to paragraph (5). No referendum with respect to a retirement system shall be valid for purposes of this paragraph unless held within the two-year period which ends on the date of execution of the agreement or modification which

extends the insurance system established by this title to such retirement system, nor shall any referendum with respect to a retirement system be valid for purposes of this paragraph if held less than one year after the last previous referendum held with respect to such retirement system.

42 USC § 418

(a)*****
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*
*
*

(g) Termination of agreement. (1) Upon giving at least two years' advance notice in writing to the Secretary of Health, Education, and Welfare, a State may terminate, effective at the end of a calendar quarter specified in the notice, its agreement with the Secretary either—

(A) in its entirety, but only if the agreement has been in effect from its effective date for not less than five years prior to the receipt of such notice; or

(B) with respect to any coverage group designated by the State, but only if the agreement has been in effect with respect to such coverage group for not less than five years prior to the receipt of such notice.